IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JEANNE MARSHALL, an individual, STEVE TAFOYA, an individual, BRUCE DEATON, an individual, and CRAIG KNIGHT, an individual, on behalf of themselves and all other similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-02-195 WCC
PRICELINE.COM INCORPORATED,	)	
Defendant.	)	

Submitted: October 1, 2009
Decided: March 8, 2010

MEMORANDUM OPINION

On Defendant Priceline.com's Motion for Summary Judgment - GRANTED
On Plaintiff Jeanne Marshall's Motion for Partial Summary Judgment - DENIED

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait & Goddess, P.A., Suite 1401, 919 Market Street, P.O. box 1070, Wilmington, DE 19899-1070. Attorney for Plaintiffs.

Karen L. Valihura, Esquire; Michelle L. Green, Esquire; Skadden Arps Slate Meagher & Flom LLP, One Rodney Square, P.O. Box 636, Wilmington, DE 19899. Attorneys for Defendant.

CARPENTER, J.

Introduction

Before the Court is Defendant Priceline.com, Inc.'s ("Priceline") Motion for Summary Judgment and Plaintiff Jeanne Marshall, et al.'s ("Plaintiffs") Motion for Partial Summary Judgment. Upon review of the record and the briefs filed in this matter, this Court hereby grants Priceline's Motion for Summary Judgment and denies the Plaintiffs' Motion for Partial Summary Judgment.

Facts

Priceline is an online travel company that facilitates the reservation of hotel rooms often at heavily discounted rates. The Plaintiffs in this litigation made hotel reservations online using Priceline's "name your own price" system (NYOP). NYOP is a patented and proprietary booking system unique to Priceline that allows a customer, after selecting a geographic zone or combination of zones in which the customer desires to make a hotel reservation and designating the star rating of the hotel the customer desires, to submit a "bid" - a price the customer is willing to pay per night for a hotel room (offer price) meeting that criteria. After providing the required information, the customer is shown a summary of the transaction that includes the offer price submitted by the customer and a listing for the "taxes and service fees" associated with the proposal. At this point, the customer is required to acknowledge they have read and agreed to the "terms and conditions" for the transaction and finalizes the offer.

Once the offer is submitted, Priceline initiates a proprietary allocation algorithm to determine if a hotel can be located that meets the customer's parameters. If the allocation process fails to find a room meeting all of the customer's parameters, the customer receives a rejection of the offer and can repeat the process using different parameters. If the allocation process locates a hotel meeting all of the customer's criteria, a hotel reservation is made. It is at this point that the customer will learn of the specific hotel that was selected. It is undisputed that the Plaintiffs used the NYOP process, received hotel reservations that met their particular parameters and stayed in the hotels where the reservations were made.

Until Priceline runs the allocation algorithm and finds a matching hotel, it does not know what hotel that reservation will be booked at or the location of the hotel and its applicable tax rate. This has presented unique challenges to Priceline in how best to disclose this information to the consumer. Prior to May of 2003, the customer was told that in addition to a flat $5.95 per room processing fee, there would be a tax recovery fee that would not exceed 20% of the offer price. To allegedly address customer's concerns about the uncertainty of the tax charge, Priceline in 2003 developed a formula to estimate the tax likely to be charged by the hotel once the reservation had been made.[1] Thus, after May of 2003 when the customer would

[1] The service fee calculation was also modified but the Court has previously ruled this calculation provided no basis to support this litigation.

attempt to book a room using the NYOP system, the customer would be told of the amount of taxes and service fees associated with the transaction which would be listed as a single amount. If the tax calculation was too low, Priceline was responsible for the difference. When the tax calculation was higher than the tax actually charged for the room, Priceline retained the difference.

The Plaintiffs claim that the retention of overpaid taxes violates the terms and conditions of the contractual relationship between them and Priceline. The dispute centers on how one interprets the contract language "relevant taxes and service fees disclosed to the user."[2] The Plaintiffs argue that the phrase "relevant taxes" means that the Defendant could only charge users the taxes the Defendant actually paid for the hotel room and the process of estimating the taxes and retaining the overage is prohibited. Priceline asserts that the Plaintiffs were advised of the specific dollar amount that would be collected for taxes and service fees over their offer price and so long as the Plaintiffs were not assessed a different amount, what was bargained for by the Plaintiffs was provided and the contract was not breached.

Finally, the Plaintiffs assert that the difference between the offer price made by the consumer and the amount that Priceline actually paid for the hotel room has been identified by the Defendant as "compensation for the services it provided." As such,

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[2] Pls.' Second Am. Class Action Compl. Ex. A at 5.

the Plaintiffs assert that the contract requires that this amount be disclosed as a service fee to the consumer. The Defendant asserts that this difference is simply the profit margin related to the transaction and as such, there is no requirement of disclosure.

Procedural Context

In 2006, Priceline moved to dismiss some of the Plaintiffs' claims set forth in their initial complaint. After briefing and argument this Court dismissed two of the Plaintiffs' claims which alleged violations of the Delaware Consumer Fraud Act and the breach of contract and breach of implied covenant of good faith and fair dealing relating to allegations regarding Priceline's service fee charges.[3] The Court, however, did allow the litigation to proceed on a breach of contract and implied covenant of good faith and fair dealing based upon a claim that Priceline was paying to the taxing authorities an amount of tax based upon the "wholesale" price of the room, (i.e. the price Priceline paid the hotel for the rights to sell that room) but that Priceline then would charge its customers for taxes based upon the "retail" price of the room (i.e. the price the consumer buys it from Priceline).[4] The claim asserted is that this increased assessment was simply pocketed by Priceline in violation of the contract terms.

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[3] *Marshall v. Priceline.com, Inc.,* 2006 WL 317 5318 (Del. Super. Oct. 31, 2006).

[4] The amount of taxes required to be paid governmental entities has been the subject of numerous suits filed throughout the Country.

After further discovery and what the Court perceives as a realization by the Plaintiffs that the original theory of their case was either no longer supportable or too difficult to establish, they again on March 24, 2008 moved to amend their first amended complaint. The motion was granted by the Court on August 28, 2008[5], and it is this complaint that contains the theories of liability that have been more thoroughly set forth in the facts section of this Opinion.

Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact.[6] A genuine issue of fact exists if "any rational trier of fact would infer that plaintiffs have proven the elements of a prima facie case."[7] The Court must consider the facts in a light most favorable to the non-moving party.[8] If the evidence shows that there are no material facts in dispute, then the burden shifts to the non-moving party to demonstrate that such facts do exist and that trial is required to resolve them.[9]

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[5] *Marshall v. Priceline.com, Inc.,* 2008 WL 415 2740 (Del. Super. Aug. 28, 2008).

[6] *Roberts v. Delmarva Power & Light Co.*, 2009 WL 222985, at *3 (Del. Super. Jan. 13, 2009) (citing Super. Ct. Civ. R. 56(c)).

[7] *Id.* (quoting *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.,* 794 A.2d 1141, 1149 (Del. 2002).

[8] *Id.*

[9] *Collins v. Ashland, Inc.*, 2009 WL 81297, at *2 (Del. Super. Jan. 6, 2009).

Resolving a contractual dispute via summary judgment is appropriate where the disputed terms of the contract are clear and unambiguous.[10] Contractual terms are ambiguous if they are subject to more than one interpretation.[11] Thus, to succeed on a motion for summary judgment, the moving party must establish that its interpretation of the contract is the only reasonable one.[12] In Delaware, an objective approach governs contractual interpretation: "a contract's construction should be that which would be understood by an objective reasonable third party."[13] Therefore, clear and unambiguous contractual language is interpreted based on its "ordinary and usual meaning."[14]

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[10] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

[11] *Matulich v. Aegis Commc'ns Group, Inc.*, 2008 WL 187511, at *3 (Del. 2008) (citing *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 2007 WL 3208783 (Del. 2007)); *Eagle v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). *See also United Rentals*, 937 A.2d at 830 (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

[12] *United Rentals*, 937 A.2d at 830 (citing *Modern Telecomms., Inc. v. Modern Talking Picture Serv.*, 1987 WL 11286, at *3 (Del. Ch. 1987)).

[13] *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. 2007) (citing *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. 1999)).

[14] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).

Discussion

a. Tax Overcharge Claim

As a general premise, the Court believes it is reasonable to conclude that in the context of a transaction like the one between the parties, the Plaintiffs as consumers are only concerned that the overall cost that is disclosed to them will be the amount that will be charged for obtaining the hotel room. Common sense would dictate that if consumers found that the collected fee characterized as "taxes and service" made the transaction too costly, the transaction would be terminated by them. In other words, the reasonableness of this fee will be dictated by the market. If, however, the consumers are willing to proceed forward to request a reservation, they have very little interest or concern if, for example, the $87 listed as "taxes and service fees" represents a $10 tax and a $77 service fee or some other combination. As long as they have no obligation beyond what was disclosed, the distinction now argued by the Plaintiffs is simply meaningless to the normal consumer.

To put this in some factual context, since Priceline changed the method of calculating taxes and service fees in May of 2003, Plaintiff Knight used the NYOP process to reserve hotel rooms on 29 separate nights in the Palm Desert/Indian Wells area of California.[15] If the Court accepts the Plaintiffs' assertion that what has been identified during discovery as a "transaction fee" by Priceline, is the miscalculation of

[15]App. to Pls.' Answer Br. Ex. A at PCLN MAR A-1 - A-3.

the taxes associated with those rooms, Plaintiff Knight was over assessed for those 29 nights a total of $39.70 or an average of $1.36 per night. Plaintiff Marshall used the service only once and was over assessed four cents.[16]

Within this context, the contractual basis that controls the relationship between the parties is contained in an online document referenced as "Priceline.com terms and conditions."[17] Throughout the relevant time frame the NYOP service was used by the Plaintiffs, taxes and service fees were referenced in the contract as follows:

> User agrees that if a hotel room satisfying your Priceline request is located, Priceline.com will confirm the reservation and charge the entire amount of the stay, including the relevant taxes and service fees disclosed to the user before submitting an offer, to your credit card.[18]

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[16] *Id*.

[17] Pls.' Second Am. Class Action Compl. Ex. A.

[18] This language was changed in March of 2005 primarily in response to litigation by the Plaintiffs and others. The language now used states the following:

> In connection with facilitating your hotel transaction, priceline will charge your credit card for Taxes and for Service Fees. This charge includes an estimated amount to recover the amount we pay to the hotel in connection with your reservation for taxes owed by the hotel including, without limitation, sales and use tax, occupancy tax, room tax, excise tax, value added tax and/or other similar taxes. The amount paid to the hotel in connection with your reservation for taxes may vary from the amount we estimate and include in the charge to you. This charge also includes an amount to cover service costs we incur in connection with handling your reservation. The charge for Taxes and Service Fees varies based on a number of factors including, without limitation, the amount we pay the hotel and the location of the hotel where you will be staying, and may include profit that we will retain.

Unfortunately this language was not in place in 2003 since in the Court's view it would totally undermine the litigation now brought by the Plaintiffs. While a better statement of the intention of the Defendant, the Court does not believe it changes the Court's opinion concerning this allegation of the Plaintiffs.

While discovery has disclosed to the Plaintiffs the methods used by Priceline to determine the tax and service fee calculations, it does not appear that such details were included in the terms and conditions of the contract or even within the "popup" screens identified by the Plaintiffs. At best, the Court has been provided what appears to be Defendant's answers to frequently asked questions that a consumer could electronically access in May of 2003 that responded in relevant part to the question "What taxes and surcharges will I pay?" by stating the following:

> Standard state and local taxes (which currently average about 12% and will not exceed 20% of your offer price) are not included in your offer price and will be itemized on your contract page before you submit your offer...[o]n both U.S. and International offers, priceline includes a processing fee with the taxes to cover the costs of booking and servicing your offer.[19]

There is no dispute that Priceline disclosed an amount for taxes and to service each transaction. The dispute of this litigation relates to the makeup of that amount and whether it is correctly calculated based upon the contractual obligations of the parties. From the Court's perspective, this simply misses the point.

The Court views the taxes and service fees line on the transaction disclosed to the Plaintiffs as simply the amount over the offer price that the Plaintiffs would be obligated to pay if they want Priceline to find a reservation for them that meets their parameters. This is the amount that the Plaintiffs are obligating themselves to pay and

[19] App. to Pls.' Answer Br. Ex. A at PCLN MAR 0000300.

how that amount is calculated or how much of it represents taxes or how much of it represents Priceline's fee for servicing the contract is simply not critical to the party's contractual obligation. While the parties may have mathematically broken the calculation into precise segments and have determined for each transaction whether there was an overage or understatement of the exact tax calculation, such precision was not contained within or required by the contract. The contract simply required Priceline to disclose the fees associated with servicing the Plaintiffs' request. As long as the total amount was disclosed and the Plaintiffs were willing to proceed by indicating their acceptance of that amount, the contract terms have been met.

In a perfect world, would the parties prefer a precise breakdown of taxes and fees and an accurate accounting of those items? Obviously. But within the context of the reservation system, which the Plaintiffs on their own initiative chose to use, the limitation of not knowing the hotel where the reservation will be made and the tax associated with that particular location makes that prospect simply unrealistic. If the Plaintiffs were really concerned about the taxes and service fees they were going to be assessed, they could have made the reservation at a hotel directly and avoided a service fee altogether and could have been told by the hotel exactly the amount of taxes that would be owed. The ironic twist to this litigation is that the Plaintiffs chose to use Priceline's service because they correctly perceived that they would receive a hotel

room at a significantly reduced cost and having taken advantage of this benefit, now complain about the disclosed fees associated with that transaction, even though they acknowledge the economic benefits they received by using the Priceline process. It places a new definition as to who is the greedy party here.

The Court finds it insignificant that Priceline may occasionally overestimate the taxes that it will be charged by the hotels because it is unlikely that a reasonable fact finder could fairly infer that Priceline was intentionally overcharging customers for taxes. Moreover there is nothing in the contract informing customers of the precise manner in which Priceline books hotel rooms for its customers or obligating Priceline to employ a particular method for calculating taxes and fees. Thus the Court does not find that there is a genuine issue of material fact. The contract required Priceline to "disclose" the amount above the offer price to pay taxes and service the transaction and the contract required the Plaintiffs to pay that amount if they wanted Priceline to process the transaction. This occurred and the contract terms have been complied with and thus summary judgment on this issue is granted.

b. Variable Processing Fee

The Plaintiffs next argue that when the Defendant changed the method used to calculate its service fee in 2003 using a fixed and variable component, the variable fee was nothing more than an effort by the Defendant to collect what would be the

potential tax on the mark-up between the offer price by the Plaintiffs and the actual cost of a room to Priceline. The Plaintiffs explained this theory in its answering brief as follows:

> Overall, adding 3.25% of the Room Rate to the processing fee is essentially the same as charging the average tax rate of 12% on the Mark-Up over the entire range of Defendant's Name Your Own Price transactions. By using a variable fee component based on the Room Rate, Defendant was able to achieve the result of charging a "padded" tax in a less blatant way than directly taxing the Mark-up, as Defendant had initially begun to do when it charged tax to the Room Rate before it began to "back out the margin before taxing," as described above. This enabled Defendant to earn "fees" directly proportional to the Room Rate, i.e., the "retail rate," and to the number of rooms and nights in the transactions, just as Defendant would earn through a direct tax charge.[20]

While perhaps a clever theory by counsel for the Plaintiffs, there is simply nothing to support these allegations and even if true, the amount of this fee would have been included in the fees disclosed and accepted by the Plaintiffs. As the Court has previously ruled, the Defendant is free to charge the Plaintiffs whatever fee it wanted for processing the reservation request, and the Court will not interfere or intervene in the determination of that amount. If the fee is too high, the consumer will not use the Priceline service and the marketplace will cause the Defendant to adjust or lose market share. If the Defendant believes it needed to increase its service fee to safeguard against a possible tax ruling contrary to the positions it had taken previously with governmental agencies, it was free to do so. Such conduct does not make the

[20] Pls.' Answering Br. in Opp'n to Priceline.com Inc.'s Mot. for Summ. J. at 6.

adjustment a "tax" as asserted by the Plaintiffs and the Court finds this argument is without merit.

c. The Margin

Finally, the Plaintiffs assert that in addition to the processing fee Priceline charges in connection with a particular transaction, there is a hidden fee imbedded in what Priceline refers to as a "margin" and what Plaintiffs refer to as a "mark-up." They allege that by hiding the supposed service fee, Priceline has breached its contract with consumers because the contract obligates Priceline to disclose "relevant taxes and service fees." As support for their claim, Plaintiffs rely upon an internal document of the Defendant that explains how Priceline charges customers. That document stated: "[a] customer who names their own price and purchases a room will be charged a price that includes the charge for the hotel room, as established by the Hotel, plus mark-up on that room, for Priceline.com's intermediary or facilitation services." [21] The Plaintiffs contend that this reveals that Priceline intended this to be a fee for the services it provides.

Regardless of how a party desires to characterize this item, it is undisputed that the amount we are arguing about here is the difference between the cost of the hotel room to the Defendant in contrast to the offer price made by the consumer.[22] So as an

[21] App. to Pls.' Opening Br. Ex. A at PCLN MAR 0004250.
[22] Compare *In re Orbitz Taxes and Fees Litigation*, No. 1-08-0217 (Ill. App. Ct. Sept. 30, 2009).

example, if a Priceline consumer bids $150 for a hotel room in Wilmington, Delaware and Priceline has available to it a room meeting all of the customer's parameters in Wilmington for $100, Priceline would accept the bid and in essence has made a $50 profit on the transaction. The Plaintiffs argue that because Priceline is simply a service facilitator and therefore has no "assets" that the Defendant is selling, this profit can only be the fee relating to the services the Defendant has provided and must be disclosed. The Court finds this argument simply unpersuasive.

First, the fact that Priceline as a business entity is able to obtain a greater discount for a room at a particular hotel due to the volume of business it generates and the advantages it can offer hotels by selling surplus capacity does not obligate it to disclose the transactional profit it will make on the Plaintiffs' bid. This amount is not based upon the services provided to the consumer but is the profit it is able to generate from the business model it is using. Secondly, common sense would reveal that disclosure of that amount in advance of the transaction is not only impossible under the NYOP process but would totally undermine the bidding process that is the backbone of the transaction. Until the algorithm is processed, the Defendant has no way of predicting what hotel will be awarded the business and as such, no way of actually projecting the profit that it would make on a particular transaction. In addition, the consumers who use this service realized that this is a bidding process just as if they had

walked into an auction house to bid on a piece of art. They do not expect in an auction house to ever be told what the piece of art may have cost the seller prior to them buying it or the profit that the seller would make from the bidding process, and the same is true for the NYOP transaction. Reasonable users of this service would appreciate that Priceline is in the business of profiting from these transactions and as long as the consumers are receiving from their perspective a sufficient bargain from their bid, they are unconcerned what profit the Defendant may be otherwise generating. They had bid an amount that they believe they would generally be unable to receive if they did not use the Priceline process, and as long as the Defendant honors the commitment it has made to not charge beyond what has been disclosed, they have no basis to complain. If the Court accepted the Plaintiffs' premise, it would require Priceline in some manner to respond to the bid prices by indicating that while the customers were willing to pay a particular price for the hotel room, Priceline can get it for them at even a cheaper price so they would automatically reduce the customer's bid. While a clear winning proposition for the consumers, it is simply fanciful thinking and clearly not required under any contractual terms.

The Court views this again as an attempt by the Plaintiffs to use language describing the bidding process out of context and to manipulate those words in an attempt to create some contractual obligation by the Defendant where none exists.

Unfortunately for these Plaintiffs this square box will not fit into the round hole they are attempting to use.

Conclusion

As indicated above, the Court will grant summary judgment in favor of Priceline. The Court believes that this opinion may bring the litigation to a conclusion but it is unclear whether the Plaintiffs have abandoned or intend to pursue their earlier tax claim addressed in the Court's opinion on August 28, 2008.[23] The Court is concerned that the litigation appears to be pressed not because the Plaintiffs have an interest in the case but to generate a larger class action that will result in little recovery for individual plaintiffs but would overall generate a potential economic harm to the Defendant and significant attorney fees for Plaintiffs' counsel. The Court's view is influenced by the fact that the named Plaintiffs are not from Delaware and appear to simply be "found" Plaintiffs by counsel. This undermines the propriety of the litigation since, even when given an opportunity by the Court to discover Delaware plaintiffs who would have an interest in joining the litigation, they have not done so. There are clearly times when actions of this nature are not only appropriate but serve

[23] The summary judgment briefing by the parties appear to reflect a difference of opinion regarding how the alleged tax claim would be established and who would be obligated to prove the differing tax assessments. While not ruling on this issue since it is not before the Court, it reminds Plaintiffs they have the burden of proof and would expect their theory of the case to be established by the evidence they submit to the jury.

a greater good to correct an egregious practice of a corporation that would not be addressed on an individual basis. However, in spite of years of discovery, this does not appear to be one of those societal ills that justify the time, expense and effort that has occurred here. The Plaintiffs' actions have caused Priceline to do a better job of providing information to the consumer and that is a positive result. But one has to wonder if this is really the type of litigation that is in the best interest of justice or is it one society believes is warranted and whether it is simply another example that will be used to criticize the legal profession. The Court is not judging the merits of the Plaintiffs' actions taken to date but is simply suggesting that if they believe a claim remains that they take another look whether the litigation should continue now that extensive discovery has occurred.

In any event, Priceline's Motion for Summary Judgment is granted and Plaintiffs' Motion for Partial Summary Judgment is denied consistent with the reasons set forth above.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.